

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:09-CR-383-BO-1
No. 5:11-CV-473-BO

SANDRA ELLIOTT,)
Petitioner,)
)
v.) ORDER
)
UNITED STATES OF AMERICA,)
Respondent.)

This matter is before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 [DE 44]. The Government has responded [DE 48], and the matter is ripe for ruling.

BACKGROUND

Petitioner, Ms. Elliott, pleaded guilty pursuant to a written plea agreement on January 15, 2010, to a criminal complaint charging her with health care fraud and aiding and abetting health care fraud. Ms. Elliott was sentenced by this Court on September 10, 2010, to a term of 120 months in the custody of the Bureau of Prisons. Ms. Elliott filed the instant motion on September 9, 2011.

DISCUSSION

Ms. Elliott alleges in her § 2255 Motion that, *inter alia*, her trial counsel failed to file a direct appeal upon her request. “[F]ailure to file a requested appeal is *per se* ineffective assistance of counsel, irrespective of the possibility of success on the merits.” *United States v. Foster*, 68 F.3d 86, 88 (4th Cir 1995) (emphasis omitted). The Court finds, with the concurrence of the Government, that the appropriate remedy is to vacate Ms. Elliott’s sentence and impose a

new, identical sentence so that Ms. Elliott may, if she so wishes, file a direct appeal. *See United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *United States v. Mongold*, 259 Fed. Appx. 539, 540 (4th Cir. 2007) (listing cases).

CONCLUSION

Accordingly, the Clerk is DIRECTED to VACATE the judgment of conviction entered in this matter on September 10, 2010, and to re-enter a new, identical judgment of conviction from which Ms. Elliott may appeal consistent with the Federal Rules of Appellate Procedure. Ms. Elliott's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 is therefore DISMISSED WITHOUT PREJUDICE as MOOT.

SO ORDERED, this 22 day of November, 2011.


TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE